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Counsel for Defendants

**UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA**

SANDY HACKETT, an individual

Plaintiff,

vs.

RICHARD FEENEY, an individual;  
 ARTHUR PETRIE, an individual; TRP  
 ENTERTAINMENT, LLC, a Nevada limited  
 liability company, PLAYLV GAMING  
 OPERATION, LLC d/b/a PLAZA HOTEL  
 AND CASINO, a Nevada limited liability  
 corporation; BROADWAY BOOKING  
 OFFICE NYC, LTD, a New York  
 corporation,

Defendants.

RICHARD FEENEY, an individual;  
 ARTHUR PETRIE, an individual; TRP  
 ENTERTAINMENT, LLC, a Nevada limited  
 liability company, PLAYLV GAMING  
 OPERATION, LLC d/b/a PLAZA HOTEL  
 AND CASINO, a Nevada limited liability  
 corporation; BROADWAY BOOKING  
 OFFICE NYC, LTD, a New York  
 corporation,

Counterclaimants,

vs.

SANDY HACKETT, an individual

Counter-Defendant.

Case No. 2:09-cv-02075-RLH-LRL

**DEFENDANTS/COUNTERCLAIMANTS'  
 MOTION TO COMPEL THE  
 DEPOSITION OF PLAINTIFF SANDY  
 HACKETT**

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1 Defendants/Counterclaimants Richard Feeney, Arthur Petrie, TRP Entertainment,  
 2 LLP ("TRP"), PlayLV Gaming Operation, LLC d/b/a Plaza Hotel and Casino ("PlayLV"),  
 3 and Broadway Booking Office NYC, Ltd. ("Broadway") (hereinafter collectively,  
 4 "Defendants") hereby move to compel the deposition of Plaintiff/Counter-Defendant Sandy  
 5 Hackett (hereinafter "Plaintiff" or "Hackett") pursuant to Rule 30 of the Federal Rules of  
 6 Civil Procedure. Plaintiff has refused to appear for deposition unless Defendants obtain  
 7 new counsel, demanding that Defendant's present counsel is conflicted from representing  
 8 Defendants and must be disqualified. However, Plaintiff has no legal basis for demanding  
 9 the disqualification of Defendants' counsel, and his deposition should be compelled by this  
 10 Court.

11 This Motion is made pursuant to Rules 30 and 37 of the Federal Rules of Civil  
 12 Procedure and is based upon the attached memorandum of points and authorities, the  
 13 Declarations of Mark G. Tratos (the "Tratos Decl.") and F. Christopher Austin (the "Austin  
 14 Decl."), the papers and pleadings on file herein, and any oral argument permitted by this  
 15 Court.

16 DATED this 7th day of May, 2010.

17 Respectfully submitted,

18 GREENBERG TRAURIG, LLP

19  
 20 By: F. Christopher Austin

21 MARK G. TRATOS, ESQ.

22 Nevada Bar No. 1086

23 F. CHRISTOPHER AUSTIN, ESQ.

24 Nevada Bar No. 6559

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**CERTIFICATION PURSUANT TO FED. R. CIV. P. 37(a)(2)(B)**

Under Fed. R. Civ. P. 37(a)(2)(B), a party making a motion to compel discovery “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” The certification document must accurately and specifically convey to the court who, where, how and when the respective parties attempted to personally resolve the discovery dispute. See Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166, 170 (D. Nev. 1996).

In this instance, Defendants’ counsel telephoned Plaintiff’s counsel on May 6, 2010 and informed him that Defendants would file the instant Motion if Mr. Hackett did not consent to having his deposition in a reasonable timeframe. (See Austin Decl., ¶ 3.) Plaintiff’s counsel refused to make his client available for deposition unless Defendants’ counsel withdrew from representation on the grounds that Defendants’ counsel had formerly represented Plaintiff in an unrelated matter. (See id., ¶ 4.) Defendants’ counsel disagreed, and noted that the prior representation was of Defendants at a time when Plaintiff was employed by, and aligned with, Defendants, concerned matters unrelated to the present action in which counsel never obtained any confidential information from Plaintiff and by which Plaintiff cannot be prejudiced in the instant matter. (See id., ¶¶ 6-11.) As such, in Nevada, Plaintiff has no basis upon which to disqualify Defendants’ counsel or to demand removal as a condition to setting the deposition of Mr. Hackett.

**I. INTRODUCTION**

Since before the inception of this case, Plaintiff Hackett has threatened to move to disqualify Defendants’ counsel, claiming that Defendants’ counsel had formally represented him. (See Tratos Decl., ¶¶ 5-6.) Defendants, TRP and Richard Feeney (“Feeney”) have had a long-standing relationship with Defendants’ counsel, Greenberg Traurig, LLP, and specifically with Mark Tratos, Esq. (“Tratos”). (See id., ¶ 7.) During the course of such relationship, Defendants’ counsel has represented Defendants in various unrelated matters. Regarding these prior representations, there are two matters specifically at issue

1 where Plaintiff claims that he was represented by Defendants' counsel in his individual  
2 capacity (collectively the "Prior Matters") - the first is a meeting that took place between  
3 Tratos, Feeney, Arthur Petrie ("Petrie") and Hackett allegedly before the formation of TRP,  
4 and the second is a case captioned Barton Music Corp. v. TRP Entertainment, LLC (and a  
5 companion case Maraville Music Corp. v. TRP Entertainment, LLC, which two cases were  
6 eventually consolidated because they dealt with related issues.) (See id., ¶¶ 8-13.)  
7 However, Defendants' counsel did not represent Plaintiff in his individual capacity in either  
8 of those matters. Additionally, even if this Court finds that an attorney-client relationship  
9 was formed as between Defendants' counsel and Hackett in one or both of these Prior  
10 Matters, the issues in the matter at hand are not substantially related to the issues in those  
11 Prior Matters, and no confidential information was ever given in those Prior Matters (in fact  
12 none was given at all by Hackett) that could be used to disadvantage Plaintiff in the current  
13 matter. Therefore, Defendants' counsel should not be disqualified from this case.

14 As discussed in more detail herein, the meeting between Tratos, Feeney, Petrie and  
15 Hackett, now alleged to have occurred prior to the formation of TRP, was represented to  
16 Tratos to have occurred post formation. (See id., ¶ 8.) Tratos, therefore, reasonably  
17 believed he was giving counsel on behalf of TRP, not on behalf of any individual, and that  
18 counsel concerned matters not substantially related to the instant case. (See id., ¶¶ 8-9.)

19 Regarding the Barton/Maraville case, Plaintiff claims that Defendants' counsel's filing  
20 of pleadings in that matter on behalf of "Defendants" in the plural included representation of  
21 Hackett individually, since he was a named defendant, and automatically disqualifies  
22 Defendants' counsel from being adverse to Hackett in this matter. (See Austin Decl., ¶¶ 6-  
23 7.) However, Hackett never retained Defendants' counsel, nor was Defendants' counsel  
24 employed to retain Hackett. Rather Defendants' counsel became co-counsel of record later  
25 in the case specifically on behalf of TRP to defend the company's interests in an unrelated  
26 dispute over music rights and royalties. (See Tratos Decl., ¶¶ 11-12.) To the extend  
27 Hackett's interests were aligned with TRP, his interests were defended, however, at no  
28 time did Tratos or the firm consider the representation to be on Hackett's behalf: there was

1 no separate engagement agreement with Hackett, no communications with Hackett or to  
 2 which Hackett was copied by the firm, and no confidential information received from  
 3 Hackett. (See Tratos Decl., ¶¶ 12-13.) As such, at no time during either Prior Matter did  
 4 Defendants' counsel consult with or learn anything that could prejudice Hackett in this  
 5 matter. (See id., ¶¶ 9, 13.)

6 To date, Plaintiff has taken no action to back up his disqualification threat<sup>1</sup> and, for  
 7 many months after this case was filed, the Parties proceeded in the normal course of  
 8 litigation. Only after Plaintiff's deposition was properly noticed and several weeks had  
 9 passed did he threaten a motion to disqualify in order to avoid being deposed. (See Austin  
 10 Decl., ¶¶ 3-4.)

11 Over the past month, Plaintiff took the depositions of all Defendants and Defendant  
 12 representatives that Plaintiff requested. Plaintiff posted no objection to the fact that  
 13 Defendants' counsel were present for, and defended, each and every one of those  
 14 depositions. (See Austin Decl., ¶ 13.) Additionally, on behalf of Defendants, Defense  
 15 counsel has reviewed and produced thousands of pages of documents responsive to the  
 16 numerous production requests served by Plaintiff, propounded discovery requests on  
 17 Plaintiff, filed pleadings and motions on behalf of Defendants, and have extensively  
 18 engaged Plaintiff's counsel in good faith negotiations and communications regarding the  
 19 prosecution and defense of this case. (See id.) At no time, has Plaintiff ever complained  
 20 that such actions or such representation prejudiced him in this matter. (See id.) Only when  
 21 he faced the prospect of meeting his own production deadline and a looming deposition  
 22 date, did Plaintiff condition further proceeding with his deposition on Defense counsel's  
 23 withdrawal. (See id.)

24 This condition is unreasonable, severely prejudicial to Defendants, and should not  
 25 be countenanced. Plaintiff has no lawful basis to demand Defense counsel's removal, and  
 26 he should be compelled to appear for deposition. As such, Defendants respectfully request  
 27

28 <sup>1</sup> Although in response to counsel's "meet and confer," precedent to the filing of this Motion, Plaintiff's counsel stated that he would now be preparing his own motion to disqualify.

1 that the instant Motion be granted.

2 **II. STATEMENT OF RELEVANT FACTS**

3 This case primarily involves a dispute over (i) the copyright in a live musical stage  
4 show called "The Rat Pack Is Back" (the "Show"), and (ii) the buyout of Plaintiff's interest in  
5 the show by the members of the production company for the Show, TRP. TRP is a Nevada  
6 limited liability company that was formed in 2002 by Defendant Richard Feeney, Defendant  
7 Arthur Petrie, and Plaintiff Hackett and has been the production entity and owner of the  
8 Show since 2002. During that time, TRP has been responsible for the production of the  
9 Show in various venues in Las Vegas, Nevada, including most recently at the Plaza Hotel &  
10 Casino, as well as a traveling production of the Show internationally and throughout the  
11 United States. The Show was created and written by Feeney, Hackett, and others with the  
12 intent that it be a joint work of authorship for TRP's benefit, and it incorporates some  
13 original material as well as a good deal of preexisting material to which neither Feeney nor  
14 Hackett can claim any exclusive copyrights.

15 The three members of TRP conducted business under the original Operating  
16 Agreement of TRP until March 25, 2005, when Feeney, Petrie and Hackett unanimously  
17 executed an amendment to the Operating Agreement. This amendment included an  
18 optional buyout clause which set forth that the divorce of any member from his wife formed  
19 the basis under which a member's entire interest in TRP could be purchased by the other  
20 remaining members for a predetermined amount. (See Exhibit C to Plaintiff's Complaint).

21 During the period of time between March 25, 2005 and September 2, 2006, Hackett  
22 experienced personal circumstances leading to the separation and subsequent filing of  
23 divorce papers. On September 2, 2006, Feeney, Petrie, and Hackett, as the only three  
24 members of TRP, agreed to effect the purchase of Hackett's interest in the company by  
25 Feeney and Petrie for the total amount of Forty Thousand Dollars (\$40,000.00) as  
26 predetermined in the March 25, 2005 amendment to the TRP operating agreement. Such  
27 purchase was memorialized in writing, executed by all three members of TRP, in a simple  
28 one-page Purchase Agreement that set forth the terms of Hackett's sale of his interest in

1 TRP to Feeney and Petrie. (See Exhibit D to Plaintiff's Complaint.) Full payment was  
2 subsequently delivered and accepted by Hackett. (See Hackett's Complaint ¶ 18).

3 While from that point forward Hackett was no longer an owner of TRP, he was still  
4 involved with the Show as a producer and performer. Later, Hackett became discontented  
5 with TRP and the production and direction of the Show and manifested that discontent in  
6 ways that were counterproductive to the continued success of the Show, including  
7 Hackett's agitation of employees, his use of corporate opportunities for his and his wife's  
8 personal benefit, and his neglect of his responsibilities. (See Complaint ¶ 19). As such, on  
9 September 9, 2009 TRP effectively terminated Hackett's involvement in the Show.

10 In retaliation for his dismissal, Hackett now claims for the first time that he alone  
11 wrote the Show, and therefore, is sole owner of the copyright thereto and that Defendants  
12 must immediately cease performing. In fact, unbeknownst at the time to the other  
13 members of TRP, on June 7, 2005, Hackett secretly filed his own copyright application with  
14 the United States Copyright Office for the work titled "The Tribute To Frank, Sammy, Joey,  
15 and Dean," with an alternate title included on the electronic copyright record of "The Rat  
16 Pack returns in the tribute to Frank, Sammy, Joey & Dean." This application subsequently  
17 matured into United States Copyright Registration No. PA 1-284-402. (See Exhibit A to  
18 Plaintiff's Complaint.) Tellingly, Hackett never asserted his alleged sole copyright  
19 ownership of the Show until after he was dismissed, retained counsel, and filed his  
20 Complaint against Defendants.

21 While Plaintiff's counsel has raised the issue of seeking to disqualify Defendants'  
22 counsel from the outset of this case, until now, that threat has not hampered discovery, any  
23 motion practice, or the negotiations and interactions of counsel regarding the prosecution  
24 or defense of this case. (See Austin Decl., ¶¶ 5-13.) Defendants have produced thousands  
25 of documents, propounded discovery on Plaintiff, noticed the deposition of Hackett, filed  
26 motions to quash and sought protective orders on behalf of Defendants, and have  
27 defended the depositions of Defendants TRP (Feeney), Petrie, and PlayLV (Travis  
28 Anderson). (See *id.*). At no time has Plaintiff alleged or complained that any such activities

1 or representation by Defendants' counsel prejudiced or harmed him in any manner or that  
2 such representation was barred by any prior representation by Defendants' counsel. (See  
3 id.)

4 The apparent basis for Plaintiff's demand to disqualify Defendants' counsel is that  
5 Greenberg Traurig, LLP ("GT") and Quirk & Tratos ("Q&T"), which two entities merged into  
6 the same firm, GT, in 2005, along with Mark G. Tratos as an attorney formerly with Q&T  
7 and now a principal shareholder at GT (collectively referred to as "Defendants' counsel"),  
8 represented the corporate entity TRP in various unrelated legal matters while Hackett was  
9 still involved with and employed by the company. (See Tratos Decl., ¶¶ 8, 11.) Based on  
10 this representation of the corporate entity TRP, Plaintiff wrongly believes that he is entitled  
11 to disqualify GT as counsel for Defendants in this litigation. However, as evidenced by the  
12 written communications between counsel attached to the Declaration of Mark Tratos  
13 hereto, Defendants' counsel did not actually represent Hackett in his individual capacity or  
14 learn anything from Hackett that could prejudice him in this case. With regard to Hackett,  
15 the only representation undertaken by Defendants' counsel was as counsel for the  
16 corporate entity TRP. (See id., ¶¶ 8, 12.) Any representation of Hackett was incidental and  
17 only in his capacity as an affiliate and employee of TRP. (See id.)

18 Again, as set forth below, the Nevada Rules of Professional Conduct and supporting  
19 case law clearly show that when an attorney represents a corporate entity, without a clear  
20 agreement to the contrary, the attorney's duties and representation are to the corporate  
21 entity, not to the individual owners, members, managers, affiliates or shareholders.  
22 Additionally, under such circumstances, an attorney may continue representing the  
23 corporate entity as against a former owner, member, manager or shareholder of the  
24 company.

25 As evidenced by the communications between counsel attached to the Declaration  
26 of Mark Tratos hereto, Defendants' counsel attempted to make this clear to Plaintiff.  
27 Additionally, on several occasions, Defendants' counsel asked Plaintiff to produce any  
28 evidence that would tend to show representation of Hackett in his personal capacity. (See

1 Tratos Decl., ¶ 6.) Plaintiff never produced any such evidence.<sup>2</sup> (See id.)

### 2 **III. LEGAL ARGUMENT**

#### 3 **A. Standard of Review**

4 Under the Federal Rules of Civil Procedure, parties in civil litigation have the right to  
5 request and obtain documents and deposition testimony. Rule 30(a)(1) specifically  
6 provides that a “party may, by oral questions, depose any person, including a party, without  
7 leave of Court.” Pursuant to Fed. R. Civ. P. 37(a), parties may file motions to compel if the  
8 other party fails to comply with the requirements set forth in the Federal Rules of Civil  
9 Procedure, including for failure to attend a deposition.

#### 10 **B. Plaintiff Cannot Disqualify Defendants’ Counsel**

11 Plaintiff’s sole reason for refusing to appear for deposition is his claim that he was  
12 previously represented by Defendants’ counsel. Based on that allegation, Plaintiff has  
13 been threatening to seek to disqualify Defendants’ counsel since before this case was even  
14 filed. (See Tratos Decl., ¶ 6.) Despite those persistent threats, Plaintiff has taken no action  
15 on them, even though the Parties and their counsel have been fully engaged in this matter  
16 for over six months. Not until weeks after his deposition was noticed did Plaintiff refuse to  
17 proceed unless Defendants’ counsel was disqualified or replaced. (See Austin Decl., ¶¶ 3-  
18 4.)

19 Disqualification of a party’s counsel is “a drastic measure which courts should  
20 hesitate to impose except when absolutely necessary.” In-N-Out Burger v. In-N-Out Tire &  
21 Auto, Inc., 2008 WL 2937294, \*2 (D. Nev. 2008) (quoting Brown v. Eighth Jud. Dist. Ct.,  
22 116 Nev. 1200, 1205 (Nev. 2000)) (emphasis added). For a disqualifying conflict to exist  
23 under Nevada law, the party seeking disqualification must establish three elements: (1) that  
24 he had an attorney-client relationship with the lawyer; (2) that the former matter and current  
25 matter are substantially related; and (3) that the current representation is adverse to the  
26 party seeking disqualification. See Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct., 123

27  
28 <sup>2</sup> Plaintiff has additionally served subpoenas on GT, Q&T, and Mr. Tratos that sought confidential, irrelevant, and attorney-client privileged information. Defendants have filed a motion to quash those subpoenas, which has been fully briefed and is currently pending before this Court.

1 Nev. 44, 50, 152 P.3d 737, 741 (Nev. 2007). In this instance, Plaintiff cannot establish  
2 these elements.

3 1. Plaintiff Had No Attorney-Client Relationship with  
4 Defendants' Counsel.

5 The threshold for establishing an attorney-client relationship is fairly low for a  
6 disqualification determination. Essentially, an attorney-client relationship may be found  
7 "when a person has a reasonable belief that a lawyer was protecting that person's  
8 interests...." Restatement of the Law Governing Lawyers § 14.

9 Despite this low threshold, if Mr. Hackett can meet it at all, it is by the slimmest of  
10 margins. In the two Prior Matters where Plaintiff alleges Defendants' counsel represented  
11 him, Hackett's belief that GT was protecting his personal interests as separate and apart  
12 from Defendant TRP's is unreasonable.

13 In the first matter, Feeney, Petrie and Hackett represented to Tratos that they had  
14 formed TRP and were seeking advice on behalf of TRP, and, as a result, they received  
15 counsel exclusively for TRP. (See Tratos Decl. ¶ 8.) It is unreasonable for Hackett to  
16 believe that such a contact with Defendants' counsel created an attorney-client relationship  
17 as between him personally and the firm.

18 In the second matter, the consolidated Barton/Maraville matter, Defendants' counsel  
19 was engaged, exclusively by and on behalf of TRP, to provide expertise with regard to  
20 grand rights in an alleged infringement of three specific musical compositions. (See Austin  
21 Decl., ¶ 9.) Hackett never separately engaged GT, never communicated with any attorney  
22 at GT on the matter, or ever conveyed in any way that he believed he was being  
23 represented by GT. (See Tratos Decl., ¶¶ 11-13.) To the contrary, there are no records of  
24 Hackett ever attending any meeting with Defendants' counsel on this matter, of Defendants'  
25 counsel ever filing any pleadings on Hackett's personal behalf, of any communications ever  
26 being sent or copied to Hackett, or of any work ever being performed on Hackett's behalf.  
27 (See id.; see also Austin Decl., ¶ 9.) Indeed, aside from the caption of the matter, Hackett  
28 does not appear in any manner in the file for that case at all. (See id.) It is unreasonable

1 for Hackett to believe that in the absence of any agreement, counsel or communication with  
 2 him, that the mere fact that GT filed pleadings on behalf of “Defendants” in the plural  
 3 established an attorney-client relationship with him personally.

4 a. No Attorney-Client Relationship Was Formed at the  
 5 Alleged Pre-Formation of TRP Meeting with Tratos.

6 Plaintiff's contention that he was represented in his individual capacity by Tratos by  
 7 seeking legal advice on behalf of a business entity that - contrary to his representations at  
 8 the time - was then in the process of formation is unfounded. Courts have held that the  
 9 “entity rule” - the doctrine that representation of an entity does not automatically entail  
 10 representation of its members - applies retroactively to the seeking of legal advice in  
 11 furtherance of the formation of a corporation. See, e.g., Jesse by Reinkecke v. Danforth,  
 12 169 Wis.2d 229, 241 (Wis. 1992). For example, in Danforth, the court held that where a  
 13 person retains a firm for the purpose of organizing an entity, the firm's involvement is  
 14 directly related to that purpose, and when that entity is ultimately incorporated, the entity  
 15 rule retroactively applies. Danforth, 169 Wis.2d 229, 241; see also Manion v. Nagin, 394  
 16 F.3d 1062, 1069 (8th Cir. 2005) (recognizing this case law but noting that where an  
 17 individual sought individual advice as well as pre-formation advice on behalf of corporation,  
 18 the individual had an attorney-client relationship with incorporating attorney). The court in  
 19 Danforth found that the individual shareholder defendants, who had retained the firm for the  
 20 purposes of incorporating, had no independent attorney-client relationship sufficient to  
 21 cause a conflict of interest between individual defendants and firm's representation of the  
 22 company. 169 Wis.2d 229, 244-45.

23 Although the Danforth case dealt with a firm retained for the purpose of formation of  
 24 the entity, there is no reason to think that the rule would not extend to legal advice on  
 25 behalf of the to-be-formed entity outside of the formation context, so long as no individual  
 26 legal advice was given. The court noted that “the retroactive application of the entity rule  
 27 simply gives the person who retained the lawyer the status of being a corporate constituent  
 28 during the period before actual incorporation, as long as actual incorporation eventually

1 occurred.” Id. at 241.

2 Here, nearly a decade ago Feeney introduced Tratos to Hackett and Petrie,  
3 representing that they were his partner members in a production company which Tratos  
4 later learned was TRP. (See Tratos Decl., ¶ 8.) Although Plaintiff and the individual  
5 defendants did not employ Tratos or his firm for the purpose of forming a business entity,  
6 the alleged consultation with Tratos pre-formation was purely on behalf of TRP. (See id.)  
7 In fact, Tratos was informed that Feeney, Petrie and Hackett had already entered into an  
8 agreement on their respective ownership interest in the company, and that he was being  
9 engaged to render advice to an existing company, not to any of the individual members.  
10 (See id.) The sole purpose of seeking Mr. Tratos’ counsel was to further the business  
11 interests of TRP. Specifically, the members of TRP were looking for advice on how they  
12 could use the names of the famous performers Frank Sinatra, Sammy Davis, Jr., Joey  
13 Bishop, and Dean Martin as part of the title of their proposed tribute show to the original  
14 “Rat Pack” without running afoul of Nevada’s Right of Publicity Act, an act with which  
15 Tratos has particular experience. (See id., ¶ 9.) Plaintiff neither sought nor received legal  
16 advice in his individual capacity. (See id., ¶¶ 8-9.) Moreover, the retainer agreement  
17 eventually signed was with TRP - not with Hackett, Feeney, or Petrie - and all payments for  
18 the legal work performed were by TRP, not the individuals. (See id., ¶ 11.)

19 Hackett is an experienced businessman and a sophisticated entertainer and  
20 performer. The work that he does routinely involves lawyers and the retention of law firms.  
21 Hackett knows how retention of an attorney works, and he understood that Tratos, Q&T,  
22 and GT were acting as TRP’s attorneys, not as his own. As such, there is no reasonable  
23 basis for Hackett to believe that he established an attorney-client relationship with the firm,  
24 and no basis for disqualification arising from this initial consultation.

25 b. Defendants’ Counsel Represented TRP In the  
26 Barton/Maraville Case.

27 Defendants’ counsel was retained to represent TRP in the Barton/Maraville case,  
28 and while Plaintiff was individually named by the opposing party as a defendant along with

1 Feeney and TRP, no attorney-client relationship was actually formed as between Plaintiff  
2 and Defendants' counsel in that matter. The general rule in Nevada and elsewhere is that  
3 "a lawyer representing a corporate entity represents only the entity, not its officers,  
4 directors, or shareholders, and not any related entities such as parents, subsidiaries or  
5 sister companies." Waid v. Eighth Judicial District Court, 119 P.3d 1219, 1223 (Nev. 2005);  
6 see also, Burnett v. Rowzee, 2007 WL 2767936, at \*5 (C.D. Cal.) (the rule is that an  
7 attorney can represent a corporation in a dispute against a former officer from whom he  
8 received confidential information). Additionally, notwithstanding whether confidential  
9 information was actually acquired by the attorney, for disqualification to be appropriate, the  
10 attorney must have in fact previously represented the party who is now seeking  
11 disqualification. See Waid, 119 P.3d at 1223.

12 Here, all Plaintiff can rely upon is the technical argument that references in  
13 pleadings to "Defendants" in the plural established an attorney-client relationship. In reality,  
14 Defendants' counsel was retained to represent TRP's interests, and any representation of  
15 Hackett was merely incidental to the representation of TRP to the degree that that  
16 Hackett's interests were aligned with Defendants' counsel's representation of TRP. (See  
17 Tratos Decl., ¶¶ 11-13.) Defendants' counsel never represented to Hackett that he was  
18 being represented in his individual capacity, and Hackett never requested it. There is no  
19 engagement letter as between Hackett and Defendants' counsel, no evidence of any  
20 communications between Hackett, no evidence of any work ever being performed on  
21 Hackett's individual behalf, and no indication that Hackett ever paid a legal bill of  
22 Defendants' counsel. (See id., ¶¶ 12-13.) To the contrary, all communications were with  
23 the members of TRP, and Hackett was not a member of TRP at that time. As such,  
24 Hackett cannot reasonably believe that he was being personally represented by Defense  
25 counsel. Absent a reasonable basis for his allegation of prior representation, and absent  
26 any evidence of such a representation, there can be no conflict with the instant matter.

27 ///

28 ///

2. This Matter Is Not Substantially Related to Any Other Matter in Which Defendants' Counsel Represented TRP.

The second factor for determining whether counsel can be excluded from representation on a matter is whether the current and former matter are "substantially related." The Supreme Court of Nevada has established a three-part test for determining whether a current and former matter are "substantially related" for the purpose of disqualifying counsel: (1) the court must make a factual determination regarding the scope of the former representation; (2) the court must evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters; and (3) the court must determine whether the alleged confidential information is relevant to the issues in the present litigation. See Wald v. Eighth Jud. Dist. Ct., 119 P.3d 1219 (Nev. 2005).

By its nature, the determination of the scope of former representation is extremely fact-intensive. Perhaps the closest case factually to the instant matter is Wild Game Ng, LLC v. Wong's International (USA) Corp., 2006 WL 3434379 (D. Nev. 2006), wherein an individual named Mr. Ng was seeking to disqualify opposing counsel. In that case, the law firm Mr. Ng was seeking to disqualify represented some entities that Mr. Ng was involved with but had never represented him personally, as evidenced by the engagement letter and the payment of bills by those entities and not by Mr. Ng personally. See id. at \*4. In that matter, the court refused to disqualify opposing counsel.

As applied to the present matter, GT, Q&T, and Tratos were never retained or engaged to represent Plaintiff Hackett in his individual capacity in either the Prior Matters or at any time. (See Tratos Decl., ¶¶ 8, 12.) As such, there could be no scope of representation as to the Prior Matters outside of Hackett's status as a former member and employee of TRP, as Defendants' counsel only represented Defendant TRP. (See id.) Again, Hackett never entered into an engagement agreement with, or paid any legal bills of Defendants' counsel; only TRP did these things. Any and all communications between counsel and Hackett were de minimus, as Defendant Feeney was the primary point of

1 contact for TRP. (See id., ¶¶ 8, 13.)

2 With regard to the inquiry as to whether confidential information would have been  
3 exchanged, courts have held that a “realistic” approach is best. See In-N-Out Burger, at \*2  
4 (quoting Robbins v. Gillock, 862 P.2d 1195, 1197 (Nev. 1993)). In other words, if  
5 Defendants’ counsel had represented Hackett in the past, what sort of confidential  
6 information would have been given to counsel to defend any action brought against  
7 Hackett? In this case, any information given to Defendants’ counsel by Hackett would  
8 certainly not pertain to the underlying copyright in the Show’s script at issue in this lawsuit.  
9 After all, Hackett filed for that copyright himself in 2005 without the knowledge of TRP,  
10 Feeney, Petrie, or counsel. (See Exhibit A to Plaintiff’s Complaint.)

11 Finally, this Court must examine whether confidential information from prior matters  
12 would be relevant in the present matter. According to the Supreme Court of Nevada, a  
13 “superficial similarity between the two matters is not sufficient to warrant disqualification;  
14 rather, the focus is properly on the precise relationship between the present and former  
15 representation.” Waid, 119 P.3d at 1223. For instance, in Robbins v. Gillock, 862 P.2d  
16 1195 (Nev. 1993), the Supreme Court of Nevada held that matters were not substantially  
17 related even though both concerned medical malpractice. The court determined that the  
18 instances of malpractice were wholly distinct and that any contention that the attorney  
19 obtained disadvantageous confidences was “pure speculation.” Id.

20 Similarly, here, even if this Court finds that Defendants’ counsel did somehow  
21 represent Plaintiff Hackett individually in the past, counsel did not gain any information that  
22 would be instructive or helpful in this case. (See Tratos Decl., ¶ 13.) In his Opposition to  
23 the Motion to Quash, Hackett accuses Defendants’ counsel of representing him “in at least  
24 2 copyright actions.” (Opposition to Motion to Quash, at 2.) Even if this were true, those  
25 two consolidated actions (the Barton/Maraville case as discussed above) involved TRP’s  
26 right to use three specific songs owned by Barton/Maraville in the Show. (See Tratos  
27 Decl., ¶ 11.) Those matters have no relation to the copyright infringement action brought  
28 by Hackett here or to the counterclaims asserted by Defendants.

1 The same is true with regard to the buyout claims. In his Complaint, Hackett claims  
2 either that the buyout of his interest never occurred or that he bought back his rights at a  
3 latter time. Neither of the two Prior Matters concern this claim. The initial consultation  
4 occurred prior to the subsequent agreement to buyout Hackett's interests which occurred  
5 years later and did not concern any provision of the agreement between the members.  
6 Indeed Tratos was informed that the agreement between the members had already been  
7 reached, and he was neither asked to provide nor provided any counsel with regard to such  
8 an agreement. Similarly, the later representation of TRP in the Barton/Maraville matter on  
9 music rights also raised no issues regarding any buyout of Hackett's interest.

10 As has been repeatedly stated to Plaintiff's counsel, Defendants' counsel has no  
11 information related to the underlying copyright at issue in this lawsuit. Plaintiff did not utilize  
12 Defendants' counsel in any way to apply for and obtain that copyright. He never provided  
13 counsel with a copy of the script for which he claims he received a copyright; and he never  
14 disclosed why he believed he was entitled to personally take all the rights in a script for  
15 TRP's show. To the contrary, he secretly applied for that copyright in 2005 for a show that  
16 TRP had been producing for years without the knowledge or approval of TRP or its  
17 counsel, and while he was still a member of and a fiduciary for TRP.

18 3. Information From the Prior Matter Does Not Harm Hackett in  
19 This Matter.

20 In determining whether the current representation is adverse to Hackett, this Court  
21 must again determine whether confidential information given in prior representation could  
22 be used to disadvantage Hackett in the current matter. See In re North American Deed  
23 Co., 334 B.R. 443, 445 (Bankr. D. Nev. 2005). This prong too must fail, as there was  
24 neither any confidential information given by Hackett to Defense counsel in the Prior  
25 Matters, nor could any such information, had there ever been any, have been used in this  
26 matter to disadvantage Hackett. Neither of the Prior Matters raised any issue that is  
27 substantially related to the issues in the instant matter. Accordingly, there would never  
28 have been a reason for Hackett to disclose any confidential information that could be used

1 to disadvantage him in this matter. Hackett Simply has no grounds to disqualify  
2 Defendants' counsel.

### 3 **C. Plaintiff Has Waived His Right To Disqualify Defendants' Counsel**

4 Even if this Court were inclined to find a conflict of interest here, Plaintiff has waived  
5 the right to object to such a conflict. It is well-settled in the Ninth Circuit that "[w]here a  
6 party fails to make a motion to disqualify opposing counsel in a timely manner, the court  
7 may deem that party to have waived that right." Wild Game NG, LLC v. Wong's Intern.  
8 (USA) Corp., 2006 WL 3434379, 4 -5 (D. Nev. 2006), citing Trust Corp. of Montana v.  
9 Piper Aircraft Corp., 701 F.2d 85, 87-88 (9th Cir. 1983). The Nevada Supreme Court has  
10 recognized this as well. See Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel.  
11 County of Clark, 123 Nev. 44, 49-50, 152 P.3d 737, 740 - 741 (Nev. 2007). Courts imply  
12 waiver from a long delay in objection despite knowledge of the conflict. See Wild Game  
13 Ng, 2006 WL 3434378, 4-5 (noting other courts' implying waiver after a nine month delay, a  
14 five month delay, and a two year delay, and denying a motion to disqualify brought more  
15 than a year from the time Plaintiff learned of the potential conflict); but see Yellow Cab, 123  
16 Nev. 44, 49-50 (permitting disqualification two years into the litigation where litigants had  
17 agreed to postpone the objection until after mediation was attempted).

18 Here, Plaintiff has known of this alleged "conflict" from since before filing his  
19 Complaint. (See Tratos Decl., ¶ 5.) Nevertheless, Plaintiff has permitted the case to move  
20 forward in the ordinary course, including Defendants' production of thousands of pages of  
21 documents, and Defendants' counsel's filing of motions, propounding of discovery  
22 requests, and defense of three depositions - all without objection. (See Austin Decl., ¶ 13.)  
23 Plaintiff's delay in raising this issue after Defendants' counsel has spent hundreds of hours  
24 reviewing thousands of documents and extensively consulting with Defendants and others  
25 severely prejudices Defendants and increases the costs associated with any transfer to  
26 new counsel.

27 Moreover, the delay itself in a very active litigation evidences the actual lack of any  
28 prejudice to Hackett by GT's representation of Defendants in this matter. Indeed, even at

1 the meet and confer of counsel prior to the filing of this Motion, Plaintiff's counsel indicated  
 2 that there would likely be no issue with the transfer of Defendants' counsel's work product  
 3 to any replacement counsel. (See Austin Decl., ¶ 14.) While this comment was probably  
 4 meant as a concession to try and mitigate the harm Plaintiff's counsel knows such a  
 5 transition would bring, it also amounts to a veritable acknowledgement that Hackett would  
 6 not be prejudiced by the disclosure of such work product, including any client confidences  
 7 (were there any from Hackett) to any subsequent counsel. (See id.) This is because  
 8 Plaintiff knows he never disclosed anything in the Prior Matters at all, let alone anything  
 9 that could prejudice him in the present case. (See id.)

10 The threat of disqualification to avoid or delay discovery is simply a tactic to unfairly  
 11 prejudice Defendants in the instant matter and should be rejected. Plaintiff waited until  
 12 days before Hackett's scheduled deposition to assert this alleged objection. As the Wild  
 13 Game Ng court noted:

14 the court finds it difficult to believe that Plaintiff could not have  
 15 made this motion earlier, were Plaintiff truly concerned about a  
 16 conflict of interest between Plaintiff and Defense counsel. Instead  
 17 of making a timely motion, Plaintiff waited until the eve of Mr. Ng's  
 deposition to object to Defendant's choice of counsel. Thus, the  
 court finds that the Plaintiff's motion [to disqualify opposing counsel]  
 should be denied on grounds of undue delay.

18 Wild Game NG, 2006 WL 3434379, 4-5 (emphasis added). Here too, this Court should find  
 19 that any objection to Defendants' counsel serving as defense counsel in this matter has  
 20 been waived by Plaintiff's failure to timely object.

#### 21 **D. Hackett Should Be Compelled to Appear for Deposition.**

22 Plaintiff Hackett refuses to appear for deposition unless Defendants' counsel is  
 23 replaced, but, as demonstrated herein, he has no rational basis for this demand.  
 24 Defendants have permitted their depositions to go forward. They have produced  
 25 voluminous documents to Plaintiff. They have and are engaging in discovery in good faith.  
 26 Now on the eve of deadlines for Plaintiff's production and days before a scheduled  
 27 deposition of Hackett, Plaintiff claims it cannot proceed. Such action is unwarranted, and  
 28 Defendants respectfully request that this Court find no basis for disqualification of

1 Defendants' counsel and order Plaintiff to appear for his deposition.

2 **E. Defendants Are Entitled to Their Attorneys' Fees and Costs.**

3 Pursuant to Rule 37 of the Federal Rules of Civil Procedure:

4 If the motion [to compel] is granted - or if the disclosure  
5 or requested discovery is provided after the motion was  
6 filed - the court must, after giving an opportunity to be  
7 heard, require the party or deponent whose conduct  
8 necessitated the motion, the party or attorney advising  
9 that conduct, or both to pay the movant's reasonable  
10 expenses incurred in making the motion, including  
11 attorneys' fees.

12 Fed. R. Civ. P. 37(a)(5).

13 In the instant case, Defendants have demonstrated that Plaintiff has no rational  
14 basis for refusing to permit his deposition from going forward. Defendants have tried to  
15 resolve the instant dispute without intervention from this Court. Plaintiff rejected those  
16 attempts. As such, Defendants request that this Court award them their reasonable  
17 attorneys' fees and costs incurred related to filing and prosecuting this Motion.

18 **IV. CONCLUSION**

19 For each of the reasons identified above, Defendants respectfully request that the  
20 instant Motion be granted, that this Court find no basis for the disqualification of  
21 Defendants' counsel, compel the deposition of Sandy Hackett within a reasonable  
22 timeframe, and award Defendants their reasonable expenses, including attorneys' fees  
23 incurred in making this Motion.

24 DATED this 7th day of May, 2010.

25 Respectfully submitted,

26 GREENBERG TRAURIG, LLP

27 /s/ F. Christopher Austin

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Counsel for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on May 7, 2010, I served the foregoing DEFENDANTS' MOTION TO COMPEL THE DEPOSITION OF PLAINTIFF SANDY HACKETT via the Court's CM/ECF filing system to all counsel of record and parties as listed.

/s/ F. Christopher Austin  
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